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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

BRADLEY COOPER, Individually and on
Behalf of All Others Similarly Situated,

Plaintiffs,

-against-

THORATEC CORPORATION,
GERHARD F. BURBACH,
TAYLOR C. HARRIS, and
DAVID V. SMITH,
Defendants.

Case No. 4:14-cv-00360-CW

**CLASS MOTION FOR ATTORNEYS' FEES
AND EXPENSES, AND COMPENSATORY
AWARD TO THE CLASS
REPRESENTATIVE**

Honorable Claudia Wilken

Date: Tuesday, June 25, 2019
Time: 2:30 p.m.
Courtroom: 6, 2nd Floor

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1	<i>Norris v. Mazzola</i> , No. 15-4962, 2017 U.S. Dist. LEXIS 208610 (N.D. Cal. Dec. 19, 2017) ..6
2	<i>Patel v. Axesstel, Inc.</i> , No. 14-1037, 2015 U.S. Dist. LEXIS 146949
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9	<i>Todd v. STAAR Surgical Co.</i> , CV 14-5263 MWF (GJSx), 2017 U.S. Dist. LEXIS 176183
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13	<u>Other</u>
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15	Richard Posner, <i>Economic Analysis of Law</i> , §21.9 (3d ed.1986) 7

1 Class Representative Todd Labak by and through Class Counsel, hereby moves for an
2 order:

- 3 (1) awarding attorneys' fees of 25% of the Gross Settlement Fund;
4 (2) granting reimbursement of litigation expenses; and
5 (3) awarding the Class Representative a compensatory award of \$10,000.

6 **INTRODUCTION**

7 Class Counsel achieved a \$11.9 million cash settlement against Defendants Thoratec
8 Corporation, Gerhard F. Burbach, Taylor C. Harris, and David V. Smith. Class Counsel requests
9 that the Court award them 25% of the gross settlement fund, consistent with the Ninth Circuit
10 benchmark.

11 By any measure, the Settlement is a good result for the Class, avoiding the considerable
12 risks of summary judgment, trial, and appeal. The Settlement amount represents more than 8% of
13 the estimate of likely recoverable damages from Defendants, above the average for securities fraud
14 class actions.

15 The reaction of the Class strongly supports the requested fees and expenses. The deadline
16 to file objections and to request exclusion to the Settlement is June 11, 2019, more than a week
17 after the filing of this motion. To date, in response to the Notice of Pendency, the Notice of
18 Proposed Settlement, the Settlement Administrator has not received any objections to the requested
19 fees and expenses, or Plaintiffs' reimbursement award. The Settlement Administrator has not
20 received any objection to the Settlement, and only one request to be excluded from the Settlement.
21 *See* Declaration of Eric Schachter Regarding Notice Administration ("Schechter Decl."), at ¶ 13,
22 (attached as Ex 1 to Smollar Declaration, filed herewith).

23 Pursuant to the Preliminary Approval Order, the Settlement Administrator mailed a total
24 of 59,986 notice forms to Class Members. *See* Schachter Decl. ¶ 9. The Notice expressly informed
25 Class Members that Class Counsel intended to apply for an award of attorneys' fees of up to 25%
26 of the Gross Settlement Fund and an award to the Class Representative not to exceed \$10,000, and
27
28

1 that Class Counsel would seek reimbursement of their out-of-pocket expenses not to exceed
2 \$500,000. To date, the Class appears satisfied with those requests.

3 A lodestar cross-check further confirms the fairness and reasonableness of Class Counsel's
4 fee request. Class Counsel and Liaison Counsel spent a total of approximately 3,765.75 hours of
5 professional time having a market value of approximately \$2,414,469.50 in prosecuting the claims
6 in this litigation. *See* Smollar Decl. ¶ 66. The requested 25% award will result in a lodestar
7 multiplier of approximately 1.23, which is on the low end of the range of reasonable multipliers
8 that courts in the Ninth Circuit routinely award.

9 In addition, the litigation expenses for which Class Counsel requests reimbursement,
10 \$392,445.81 are reasonable and relate to expenses routinely reimbursed. The requested
11 compensatory award to the Class Representative is reasonable given the considerable service
12 provided to the Class. For these reasons, and as further set forth below, the Class Representative
13 and Class Counsel respectfully submit that the Court award attorneys' fees of 25% of the
14 settlement fund, reimbursement of counsel's litigation expenses, and the compensatory award of
15 \$10,000 are reasonable and should be approved.

17 **I. AWARDING ATTORNEYS' FEES**

18 **A. The Guiding Principle For Fee Awards**

19 A "lawyer who creates a common fund" is entitled to fees from "those upon whom he has
20 conferred a benefit." *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 271 (9th Cir. 1989).
21 The guiding principle for determining the amount of a fee award in a common-fund case is that
22 the fee should be "reasonable under the circumstances." *In re Wash. Pub. Power Supply Sys. Sec.*
23 *Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994) ("WPPSS") (citation omitted).

24 **B. The Percentage-of-the-Fund Approach**

25 The Ninth Circuit expressly approves the use of the percentage-of-the-fund method for
26 awarding fees in common fund cases. *Paul, Johnson*, 886 F.2d 268; *Torrisi v. Tucson Elec. Power*
27 *Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). District courts in this Circuit have almost uniformly shifted
28 to the percentage-of-the-fund method in awarding fees in class actions for the following reasons:

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1 First, the percentage-of-the-fund method is consistent with practice in the private
 2 marketplace where contingent fee attorneys are customarily compensated by a percentage of the
 3 recovery. *In re Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989) (noting that in the
 4 marketplace, attorneys and their clients routinely negotiate 25% to 40% percentage fees); *In re*
 5 *Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (“The class counsel are entitled to the fee
 6 they would have received had they handled a similar suit on a contingent fee basis, with a similar
 7 outcome, for a paying client.”).

8 Second, the percentage-of-the-fund method more closely aligns the lawyers’ interest in
 9 being paid a fair fee with the interest of the class in achieving the maximum possible recovery in
 10 the shortest amount of time required under the circumstances. *See Kirchoff v. Flynn*, 786 F.2d
 11 320, 325-26 (7th Cir. 1986) (“The lawyer gains only to the extent his client gains[,] ensur[ing] a
 12 reasonable proportion between the recovery and the fees assessed to the defendant . . . reward[ing]
 13 exceptional success . . . [and] penaliz[ing] failure”).

14 Third, the percentage-of-the-fund method decreases the burden imposed on the court (by
 15 avoiding a detailed and time-consuming lodestar analysis), while assuring that the beneficiaries do
 16 not experience unnecessary delay in receiving their share of the settlement. *See In re Activision*
 17 *Secs. Litig.*, 723 F. Supp. at 1378-79; *see also In re Union Carbide Corp. Consumer Prod. Bus.*
 18 *Sec. Litig.*, 724 F. Supp. 160, 170 (S.D.N.Y. 1989) (“straight contingent fee awards [are] bereft of
 19 largely judgmental and time-wasting computations of lodestars and multipliers”).

20 Fourth, the percentage-of-the-fund approach is consistent with the plain text of the Private
 21 Securities Litigation Act of 1995 (“PSLRA”), which provides that class counsel is entitled to
 22 attorneys’ fees that represent a “reasonable percentage” of the damages recovered by the class.
 23 *See* 15 U.S.C. § 78u-4(a)(6); *see also In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 n.7 (3d
 24 Cir. 2005) (“[T]he PSLRA has made percentage-of-recovery the standard for determining whether
 25 attorney’s fees are reasonable.”).

1 **C. The Ninth Circuit Benchmark Award is 25%**

2 In the Ninth Circuit, “25% of the common fund [is] the ‘benchmark’ award for attorney
3 fees,” *Torrissi*, 8 F.3d at 1376, although some district courts in the Ninth Circuit have award
4 percentages even higher than the 25% benchmark. *See, e.g., Patel v. Axesstel, Inc.*, No. 14-1037,
5 2015 U.S. Dist. LEXIS 146949, *21 (S.D. Cal. Oct. 23, 2015) (awarding 30% fees in a securities-
6 fraud class action based on “the complexity of securities litigation, the lodestar crosscheck, and
7 the lack of any objection from the class members.”); *Morris v. Lifescan, Inc.*, 54 Fed. App. 663,
8 664 (9th Cir. 2003) (affirming 33% fee).

9 Here, Class Counsel requests no enhancement to the Ninth Circuit’s benchmark. The fee
10 request is squarely within the range of percentages courts in this Circuit award in similar securities-
11 fraud class action settlements, and highly reasonable given the favorable result achieved for the
12 Class.

13 **II. THE 25% BENCHMARK AWARD IS REASONABLE HERE**

14 **A. The Reasonableness Factors**

15 Courts consider some or all of the following non-exclusive list of factors in determining a
16 “reasonable” percentage to award as a percentage of the fund:

17 [T]he extent to which class counsel achieved exceptional results for the
18 class, whether the case was risky for class counsel, whether counsel's performance
19 generated benefits beyond the cash settlement fund, the market rate for the
20 particular field of law (in some circumstances), the burdens class counsel
21 experienced while litigating the case (e.g., cost, duration, foregoing other work),
22 and whether the case was handled on a contingency basis.

23 *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954-55 (9th Cir. 2015) (internal quotation
24 marks omitted) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 1047-50 (9th Cir. 2002).
25 *Accord, Kerr v. Screen Actors Guild*, 526 F.2d 67, 70 (9th Cir. 1975). These factors applied to the
26 case at bar demonstrate that a fee award of 25% of the gross fund is reasonable.¹

27 ¹ The 25% rate should be applied to the gross settlement fund rather than net of expenses. In
28 upholding the application in this manner, the Ninth Circuit noted that the reasonableness of a fee
request is based upon the resulting figure, not the denominator. *Powers v. Eichen*, 229 F.3d 1249,
1258 (9th Cir. 2000). “If twenty-five percent of gross is reasonable, perhaps thirty-five percent of

B. Class Counsel Achieved an Excellent Result for the Class

Courts consistently recognize that the result achieved is perhaps the major factor in making a fee award. *E.g., Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (the “most critical factor is the degree of success obtained”). Here, the payment of \$11.9 million in cash to the Class provides an excellent recovery under the circumstances. Class Counsel, after consulting with experts, estimates that the \$11.9 million Settlement represents more than 8% of maximum potential damages if the Class achieved a highly favorable outcome at trial and on appeal, and above the average securities settlement. Therefore, the Settlement represents a highly favorable recovery for the Class which supports granting the fee request.

The Settlement achieved here is several times the median percentage recovered in securities class action settlements based on data compiled by various securities litigation watchdogs. According to an analysis by Stanford University and Cornerstone Research, a defendant-oriented economic consultancy, the annual median securities class action settlement for each year between 2007 and 2016 ranged between 1.8% and 2.8% of estimated damages. *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements—2016 Review and Analysis* (Cornerstone Research 2016).² The Settlement here is more than 8% of maximum damages if the Class was successful on liability for each of the alleged false statements, loss causation for each alleged disclosure or materialization of risk, and the consulting expert’s calculation of damages. The result, therefore, would achieve an excellent result compared to the Stanford and Cornerstone median results.

C. The Risks of Further Litigation

Courts recognize that the risk of litigation is an important factor in determining a fee

net would be reasonable.” *Id.*; *see also Todd v. STAAR Surgical Co.*, CV 14-5263 MWF (GJSx), 2017 U.S. Dist. LEXIS 176183, at *24-25 (C.D. Cal. Oct. 24, 2017) (awarding attorneys’ fees and expenses to be paid from the gross settlement fund) (J., Fitzgerald). Additionally, Class Notice indicated that the fees would be requested as a percentage of the gross settlement fund.

² *See also* <http://securities.stanford.edu/research-reports/1996-2016/Settlements-Through-12-2016-Review.pdf>.

1 award. *See, e.g., WPPSS*, 19 F.3d at 1299-1300. The Class Representative and Counsel Counsel
2 believe their case is strong and that they would ultimately prevail. They recognize, however, that
3 there are considerable risks that, at trial, Plaintiffs would face additional significant risks to both
4 liability and damages. A jury might easily find that Defendants did not commit fraud or bore no
5 responsibility for the alleged wrongdoing. Moreover, a jury could accept Defendants calculation
6 of damages, which is materially less than the Class's calculation, or simply find that damages are
7 lower than the Class's calculation.

8 Plaintiffs also recognize that evidence produced in discovery may be susceptible to
9 different interpretations. This is especially the case with Defendants' claim that the INTERMACS
10 study posted on September 6, 2013 on the website for the database at the University of Alabama-
11 Birmingham School of Medicine would have alerted the market to higher thrombosis rates before
12 the New England Journal of Medicine article on November 26, 2013. Indeed, the jury might not
13 agree with Plaintiffs that the evidence demonstrated that Defendants made materially false and
14 misleading statements, acted with the requisite state of mind (*scienter*), or caused Plaintiffs'
15 losses. Plaintiffs would also face trial challenges concerning proof of control and damages. And,
16 even if successful at trial, Plaintiffs would still face the risk of an unfavorable ruling in a
17 dispositive post-trial motion or a reversal on appeal.

18
19 Given the various risks in this Action, especially Defendants' claim that material
20 information, and the strengths and weaknesses of the claims asserted against Defendants, the
21 \$11.9 million Settlement is highly favorable and in the best interests of the Class.

22 **D. Skill Required, the Quality and Efficiency of Counsel's Work**

23 The "prosecution and management of a complex national class action requires unique
24 legal skills and abilities." *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2007).
25 "This is particularly true in securities cases because the Private Securities Litigation Reform Act
26 makes it much more difficult for securities plaintiffs to get past a motion to dismiss." *Destefano*
27 *v. Zynga, Inc.*, No. 12-4007, 2016 U.S. Dist. LEXIS 17196, *59 (N.D. Cal. Feb. 11, 2016) (citing
28 *Omnivision*). The quality of Class Counsel's work on this case is reflected in the excellent result

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1 obtained. *See Norris v. Mazzola*, No. 15-4962, 2017 U.S. Dist. LEXIS 208610, *39 (N.D. Cal.
 2 Dec. 19, 2017) (“that Class Counsel have significant experience in this field ... further indicates
 3 that the fee request is reasonable”). Indeed, here, Class Counsel litigated to the Ninth Circuit and
 4 received a favorable ruling to continue the action after initially being dismissed.

5 Class Counsel have extensive, significant, and highly focused experience in the field of
 6 securities class action litigation. Indeed, Pomerantz is the oldest firm in the United States
 7 specializing in plaintiffs’ securities and derivative litigation. The Pomerantz attorneys who
 8 prosecuted this action on behalf of the Class have over 45 combined years of experience and
 9 expertise in litigating securities actions. “The quality of opposing counsel is also relevant to the
 10 quality and skill that class counsel provided ...” *Zynga, Inc.*, 2016 U.S. Dist. LEXIS 17196, *59.
 11 Plaintiffs were opposed in this litigation by the nationally respected firm of Latham and Watkins
 12 LLP, which mounted a skillful and aggressive defense by attorneys with extensive experience in
 13 securities litigation.

14 At every stage of the proceedings, Class Counsel had to perform with a high level of skill,
 15 efficiency, and professionalism. In the face of strong opposition from a highly respected securities
 16 defense firm, Class Counsel successfully investigated the claims against Defendants, drafted
 17 amended complaints that survived motions to dismiss, succeeded on appeal to the Ninth Circuit,
 18 conducted effective discovery, obtained class certification, and settled the claims in this Action
 19 on an excellent basis for the Class. Such quality, efficiency, and dedication should be rewarded.

20
 21 **E. The Contingent Nature of the Case and**
 22 **Financial Burden Carried by Class Counsel**

23 Courts recognize that the determination of a fair fee must include consideration of the
 24 contingent nature of the fee and the difficulties that were overcome in obtaining the settlement:

25 It is an established practice in the private legal market to reward attorneys for taking
 26 the risk of non-payment by paying them a premium over their normal hourly rates
 27 for winning contingency cases.

28 *See* Richard Posner, *Economic Analysis of Law*, §21.9, at 534-35 (3d ed.1986). Contingent fees
 in risky cases that may exceed the market value of the services if rendered on a non-contingent

1 basis are accepted in the legal profession as a legitimate way of assuring competent representation
 2 for plaintiffs who could not afford to pay on an hourly basis regardless of whether they win or
 3 lose. *WPPSS*, 19 F.3d at 1299.

4 Here, Class Counsel has not received any compensation over the course of the litigation
 5 against Defendants and have incurred significant expenses in litigating for the benefit of the Class.
 6 Any fee award or expense reimbursement to Class Counsel has always been at risk and completely
 7 contingent on the result achieved and on this Court's exercise of its discretion in making any
 8 award. Moreover, Class Counsel have carried the financial burden here for more than five years,
 9 and is seeking a fee with a modest 1.23 multiplier of their lodestar, which further supports a
 10 finding that the fee request is fair.

11 **F. The Customary Fee**

12 If this were not a class action, the customary contingent fee arrangement would be in the
 13 range of 30% to 40% of the recovery. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 903 n.“*” (1984)
 14 (concurrence) (“In tort suits, an attorney might receive one-third of whatever amount the plaintiff
 15 recovers. In those cases, therefore, the fee is directly proportional to the recovery.”); *In re M.D.C.*
 16 *Holdings Sec. Litig.*, No. CV 89-0090 E, 1990 U.S. Dist. LEXIS 15488, *22 (S.D. Cal. 1990) (“In
 17 private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the
 18 total recovery.”). That the 25% fee requested in this case is lower than the contingent fee
 19 arrangements between lawyers and clients customary in the private marketplace confirms that
 20 Class Counsel's request is reasonable.

21 The 25% fee requested is also within the range of fees awarded by the courts in the Ninth
 22 Circuit in securities fraud class actions. *See, e.g., Vizcaino*, 290 F.3d at 1051-52 (affirming award
 23 of 28% of \$97 million settlement); *STAAR Surgical Co.*, 2017 U.S. Dist. LEXIS 176183, at *13
 24 (awarding 25% of \$7 million settlement); *In re Amgen Sec. Litig.*, CV 7-2536 PSG (PLAx), 2016
 25 U.S. Dist. LEXIS 148577, at * 24-25 (C.D. Cal. Oct. 25, 2016) (awarding 25% of \$95 million
 26 settlement); *In re Hewlett-Packard Co. Sec. Litig.*, CV 11-1404 AG (RNBx), 2014 U.S. Dist.
 27 LEXIS 190313 (C.D. Cal. Sep. 15, 2014) (awarding 25% of \$57 million settlement).

1 Accordingly, a fee award of 25% of the Settlement Fund here is fair and reasonable.

2 **G. Lodestar Cross-Check Confirms Reasonableness of Fee Request**

3 Courts often compare an attorney's lodestar with a fee request made under the percentage
4 of the fund method as a "cross-check" on the reasonableness of the requested fee. *See, e.g.,*
5 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002); *Fischel v. Equitable Life Assur.*,
6 307 F.3d 997, 1007 (9th Cir. 2002). "[T]he lodestar calculation can be helpful in suggesting a
7 higher percentage when litigation has been protracted [and] may provide a useful perspective on
8 the reasonableness of a given percentage award." *Vizcaino*, 290 F. 3d at 1050.

9 Here, a 25% fee award would result in a reasonable 1.23 multiplier of the counsel's
10 lodestar. The total lodestar for Class Counsel and Liaison Counsel's work in this Action is
11 \$2,414,469.50 based on 3,765.75 hours. Counsel's fee request of 25% of the gross settlement
12 fund would be \$2,975,000, or approximately 1.23 times the lodestar.

13 Courts in this Circuit have routinely found that significantly higher multipliers are well
14 within the acceptable range. For example, in *Vizcaino*, 290 F.3d at 1051-52 the Ninth Circuit
15 affirmed a 28% fee award over objections that "the district court's lodestar cross-check . . . which
16 resulted in a multiplier of 3.65." *Id.* The Ninth Circuit listed twenty-three shareholder settlements
17 in which the average multiplier was 3.28. *Id.* at 1050 n.4; *see also Thomas v. MagnaChip*
18 *Semiconductor Corp.*, No. 14-cv-01160-JST, 2016 U.S. Dist. LEXIS 162120, at *26 (N.D. Cal.
19 Nov. 21, 2016) (approving securities fraud settlement and awarding attorneys' fees with a
20 multiplier of 2.54). Here, the multiplier is far lower than those found reasonable in *Vizcaino* and
21 *MagnaChip*. Accordingly, the lodestar check supports the request here.

22 **H. The Reaction of the Class Supports the Fee Award**

23 The Settlement Administrator mailed 59,986 copies of the Court-approved Notice to Class
24 Members. *See* Schachter Decl., ¶ 9. The Notice was also published *via U.S.A. Today* and *via PR*
25 *Newswire* on April 5, 2019. It was further made available the public on the Settlement
26 Administrator's website. *Id.* at ¶ 10. Class Members were informed in the Notice that Class
27 Counsel would apply for attorneys' fees of up to 25% of the gross settlement fund and were
28

1 advised of their right to object to Class Counsel's fee request. *See* ECF No. 125-1.

2 To date, there have been no objections and only one request to be excluded from the
3 Settlement in response to the Notice of the Settlement. In addition, neither the Settlement
4 Administrator nor Class Counsel has received any objections to the fee request, reimbursement
5 of expenses, or the reimbursement award to Plaintiffs. Moreover, there is no indication on the
6 court's docket sheet that any Class Member has filed any objections to any aspect of the
7 Settlement, including the attorneys' fee request, reimbursement of expenses, or the compensatory
8 award to the Class Representative.

9 Courts have recognized that "[t]he presence or absence of objections from the class is also
10 a factor in determining the proper fee award." *In re Heritage Bond Litig.*, No. 02-1475, 2005
11 U.S. Dist. LEXIS 13627, *48-50 (C.D. Cal. Jun. 10, 2005) ("conclud[ing] that the lack of
12 significant objections to the requested fees justifies an award of one-third of the Settlement
13 Fund[,] particularly where the number of objections to the fee was "remarkably small given the
14 wide dissemination of notice.").

15 Here, the absence of any objections by any Class Member supports granting the fee
16 request, reimbursement of expenses, and the compensatory award to the Class Representative.

17 **III. CLASS COUNSEL'S EXPENSES WERE REASONABLE AND NECESSARY**

18 Class Counsel's expenses are reasonable, consistent with the out-of-pocket expenses that
19 clients typically pay in complex litigation of this type, and were necessarily incurred to achieve
20 the \$11.9 million gross recovery for the Class. Class Counsel has incurred litigation expenses of
21 \$392,744.61, for which they have not been reimbursed to date. *See* Smollar Decl. ¶ 67.

22 The amount requested is over \$100,000 less than that identified in the Notice, which
23 apprised the Class Members that Class Counsel would seek expenses in an amount not to exceed
24 \$500,000. To date, there is no indication that any Class Member has filed an objection to Class
25 Counsel's request for reimbursement of expenses with the Court, the Settlement Administrator or
26 Class Counsel. *See* ECF and Schachter Decl. ¶ 13.

27 Consistent with other jurisdictions, "courts throughout the Ninth Circuit regularly award
28 MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND AWARDS

1 litigation costs and expenses—including photocopying, printing, postage, court costs, research on
 2 online databases, experts and consultants, and reasonable travel expenses—in securities class
 3 actions, as attorneys routinely bill private clients for such expenses in non-contingent litigation.”
 4 *Zynga*, 2016 U.S. Dist. LEXIS 17196, *73. Class Counsel has pursued this litigation knowing that
 5 its outstanding expenses could only be reimbursed (without interest) if the Class won at trial or
 6 obtained a settlement. Class Counsel has had no incentive to incur – and did not incur –
 7 unnecessary expenses, having carried the financial burden of these expenses for over five years.

8 The expenses for which Plaintiffs’ counsel seek reimbursement were all necessary for the
 9 successful prosecution and resolution of the Action on behalf of the Class, and are of the type
 10 routinely charged to paying clients. Indeed, the expenses included filing an appeal with the Ninth
 11 Circuit as well as extensive discovery. Accordingly, these expenses should be reimbursed out of
 12 the common fund.

13 The largest expense was for experts retained to address significant matters in this litigation.
 14 The Class’s experts supporting market efficiency analyses, damages analyses, loss causation
 15 analyses, assisting with the plan of allocation, and database and discovery analyses represent
 16 \$304,994.05 of the total expenses. Moreover, Class Counsel prepared the experts for deposition,
 17 defended the deposition in Menlo Park, and also deposed Defendant’s market efficiency expert in
 18 Boston. These expert expenses are consistent with those reimbursed in other similarly complex
 19 securities fraud litigations that have progressed to discovery. *See, e.g., In re Ashanti Goldfields*
 20 *Sec. Litig.*, No. 00-717, 2005 U.S. Dist. LEXIS 28431, *15-16 (E.D.N.Y. Nov. 15, 2005) (granting
 21 reimbursement of \$1,377,825.93 in litigation expenses and noting “the largest expense, totaling
 22 over \$500,000, was for the services of expert witnesses. . . . This is not unusual in securities
 23 litigation actions.”).

24 Reimbursement is also proper with respect to the other requested expenses. Air travel,
 25 lodging and costs incidental to travel such as meals, taxis and parking, are routinely reimbursed.
 26 *See, e.g., Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982), *vacated on other*
 27 *grounds*, 461 U.S. 952 (1983); *In re dj Orthopedics, Inc. Secs. Litig.*, No. 01-2238, 2004 U.S. Dist.

LEXIS 11457, *21 (S.D. Cal. Jun. 22, 2004) (In addition to awarding fees of 25% of the gross fund, “[t]he request for reimbursement of expenses is supported by declarations and documentation and is not challenged by any party or plaintiff. This court finds the request to be reasonable and appropriate. Hence, the court GRANTS Class Counsel’s request for reimbursement of expenses in the amount of \$ 397,916.74.”). Here, multiple trips were made between Chicago and Oakland, San Francisco, Menlo Park, Boston and New York by counsel and the Class Representative for depositions and hearings before this Court, as well as before the Ninth Circuit. All were reasonable and necessary to prosecute the claims of the Class and should be approved.

IV. THE COMPENSATORY AWARD SHOULD BE APPROVED

The Class Representative and Class Counsel also request that the Court award the Class Representative \$10,000 to compensate him for the significant time expended in representing the Class and assisting Class Counsel in the prosecution of claims against Defendants. *See* 15 U.S.C. §78u-4(a)(4). The amount is justified here because of the substantial efforts and benefit that the Class Representative conferred upon the Class. As an initial matter, the Class Representative was diligent in assuring that Class Counsel limit the fee request to no more than the 25% benchmark to maximize the distribution to the Class. Moreover, he met with counsel to prepare for a deposition and traveled from Chicago to San Francisco to sit for a deposition, produced documents in response to Defendants’ discovery requests, communicated with Class Counsel about the Action and reviewed the settlement proposal with Class Counsel. *See* Declaration of Class Representative Todd Labak in Support of Final Approval of the Settlement, Award of Attorneys’ Fees and Expenses, and Class Representative’s Compensatory Award attached as Ex. 4 to Smollar Decl., filed herewith, at ¶¶ 6-9. Indeed, the Class Representative spent over 100 hours assisting Class Counsel on behalf of the Class, including taking time from his employment to prepare and travel to San Francisco for his deposition. *Id.*

Furthermore, courts often reward more than what is being requested here. *See, e.g., In re Veritas Software Corp. Sec. Litig.*, 396 Fed. App’x 815, 816 (3d Cir. 2010) (\$15,000 for each lead plaintiff); *Buccellato v. AT&T Operations, Inc.*, No. 10-0463, 2011 WL 4526673, *4 (N.D. Cal.

1 Jun. 30, 2011) (\$20,000 to lead plaintiff); *In re Xcel Energy, Inc. Sec., Deriv. & ERISA Litig.*, 364
 2 F. Supp. 2d 980, 1000 (D. Minn. 2005) (awarding \$100,000 to lead plaintiffs because of “the
 3 important policy role [lead plaintiffs] play in the enforcement of the federal securities laws on
 4 behalf of persons other than themselves”). *See also STAAR*, 2017 U.S. Dist. LEXIS 176183, at
 5 *15 (awarding \$10,000 to a lead plaintiff).

6 Accordingly, a compensatory award of \$10,000 to the Class Representative is appropriate.

7 **CONCLUSION**

8 Securities class actions are complex and laden with risk. Many times class counsel, after
 9 expending thousands of hours of time and hundreds of thousands of dollars of expenses, receive
 10 no compensation whatsoever. Here, there was no guarantee that the Class’s claims against
 11 Defendants would bear any fruit.

12 This complex litigation has been extremely hard-fought, including briefing and argument
 13 to the Ninth Circuit, with Defendants represented by experienced and equally determined counsel.
 14 Without any assurance of success, the Class Representative and Class Counsel pursued their claims
 15 for over five years to an exceptional conclusion. This Settlement represents an excellent recovery
 16 for the Class and reflects the skill, dedication, and tenacity of Class Counsel.

17 Accordingly, Class Counsel respectfully request that the Court approve the request for
 18 attorneys’ fees in the amount of \$2,975,000.00, expenses in the amount of \$392,445.81, and a
 19 compensatory award of \$10,000 to Class Representative Todd Labak.
 20

21 Dated: May 28, 2019

22 Respectfully Submitted,

23 /s/ Leigh Handelman Smollar

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Liaison Counsel

Certificate of Service

I certify that, on the date stamped above, I caused this document and its accompanying declaration, exhibits, and proposed order to be filed with the Clerk of the Court using the CM/ECF system, which will cause notification of filing to be emailed to counsel of record for all parties.

/s/ Leigh Handelman Smollar